Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-25

In The Supreme Court of The United States

OCTOBER TERM, 1986

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,

Petitioners,

vs.

THE GOODYEAR TIRE AND RUBBER COMPANY, an Ohio corporation; THE LEE TIRE AND RUBBER COMPANY, an Ohio corporation; The KELLY-SPRINGFIELD TIRE COMPANY, a Maryland corporation; CLARENCE BURGGRAF, SR.; SHIRLEY BURGGRAF; L. K. NEWELL and GEORGE UTTERBACK,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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vs.

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Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Petitioners forced the District Court to dismiss their case with prejudice for failure to prosecute by refusing to go to trial on July 2, 1984, because they were dissatisfied with certain of that Court's interlocutory discovery and partial summary judgment orders. Petitioners then attempted to take an

improper appeal of interlocutory orders to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the dismissal, refused to consider the interlocutory orders complained of, awarded Respondents double costs for Petitioners' frivolous appeal, and remanded the case to the District Court for consideration of further sanctions against Petitioners' counsel. The District Court, after an evidentiary hearing, awarded Respondents $14,521.25 in sanctions against Petitioners' counsel for unreasonably and vexatiously multiplying proceedings in violation of 28 U.S.C. § 1927. Petitioners now seek to bring this case to this Court on Writ of Certiorari.

Petitioners' Statement of the Case is saturated with inaccuracies and omissions. For example, Petitioners tell the Court that as a result of the District Court's interlocutory orders, "nothing existed for trial." Petition, at 7. This is flatly untrue; in addition to the Robinson-Patman claims remaining to be tried, Petitioners omit all mention of their common law fraud and breach of fiduciary duty claims against the individual Respondents, which were also set to be tried when Petitioners forced the Court to dismiss the case. None of these claims was affected by the supposedly "unjust, unlawful and appeal thwarting orders" complained of by Petitioners. *See* Petition Appendix G, at 18a. Likewise, there is no factual basis whatsoever for Petitioners' reference to $1.2 million in "direct price discriminations." Petition, at 6. The examples could be multiplied, but it is not necessary to burden this Court the entire history of this case in order to demonstrate that the Petition is without merit.

SUMMARY OF ARGUMENT

This case is wholly inappropriate for consideration by

this Court. Petitioners were denied review of interlocutory orders following their refusal to proceed to trial on the remainder of their case. The Court of Appeals properly upheld the District Court's dismissal of the case with prejudice under Fed. R. Civ. P. 41(b) for failure to prosecute.

The Court of Appeals and the District Court each assessed sanctions against Petitioners or their counsel for pursuing a frivolous appeal long after its frivolousness was apparent. The Petition carries this effort one step further and raises no issues requiring the attention of this Court.

ARGUMENT

Respondents[1] urge the Court not to grant the relief requested in the Petition for Writ of Certiorari and Mandamus to the United States Court of Appeals for the Tenth Circuit, filed herein. Nothing in the Petition presents "special and important reasons" for review by this Court. Sup. Ct. R. 17.1. Furthermore, Petitioners fail "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration." Sup. Ct. R. 21.5. Certiorari should accordingly be denied[2].

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[1]Pursuant to Sup. Ct. R. 28.1, Respondents advise The Court that Respondents Goodyear Tire and Rubber Company, The Lee Tire and Rubber Company and The Kelly-Springfield Tire Company are all corporations. A list of Goodyear's non-wholly owned subsidiaries is Appendix A hereto. Lee and Kelly-Springfield are wholly owned subsidiaries of Goodyear. Neither has any non-wholly owned subsidiaries.

[2]Petitioners' request for Writ of Mandamus should be rejected out of hand. The purported mandamus petition does not comply either substantively or procedurally with Sup. Ct. R. 26 and 27. In addition, Petitioners request no additional relief which would not follow from this Court's review on Writ of Certiorari.

Petitioners advise the Court that no record other than the District Court and Appellate Court Orders is necessary to enable this Court to rule on the Petition. Petition, at 13-14. Respondents concur, adding to the Orders appended to the Petition only the District Court's July 17, 1986, Findings of Fact and Conclusions of Law awarding Respondents sanctions against Petitioner's counsel for pursuing this frivolous appeal. Opposition Appendix B. Petitioners' claims under both the Robinson-Patman Act, 15 U.S.C. § 13, and state common law were dismissed by the District Court under Fed. R. Civ. P. 41(b) following their refusal to proceed to trial. Petition Appendix H, at 19a – 20a. In view of this refusal, the Court of Appeals properly held that the District Court's dismissal was not an abuse of discretion. Petition Appendix A, at 2a.

The District Court Orders (Petition Appendices D-H) reflect Petitioners' continued failure to complete discovery within the time frame set by the District Judge, despite numerous extensions of time — and despite the promises of Petitioners to be ready for trial by April, 1984, or "dismiss the lawsuit." Petition Appendix E, at 9a; *see* Petition Appendices D, G, E and F (in chronological order). When Petitioners failed to meet that deadline as well, the District Court entered summary judgment as to certain claims as well as parties, and set the remaining claims for trial. Petition Appendices F and G. When the matter came on for trial in July, 1984, (more than a year after the original discovery cutoff) "plaintiffs announced they were not ready to proceed to trial . . . after repeated assurances from plaintiffs' counsel that plaintiffs would be ready for jury trial in April, 1984." Petition Appendix H, at 19a-20a. According to Petitioners,

"the prior orders resulted in the [Petitioners'] refusal to proceed to trial." Petition, at 9.

The inevitable result under Fed. R. Civ. P. 41(b) was dismissal of Petitioners' claims. Petition Appendix H. Petitioners' attempt to obtain review of the District Court's interlocutory orders was rebuffed on the basis of opinions of this Court and of the Courts of Appeals. Petition Appendix A; *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978); *Bowe v. First of Denver Mortgage Investors,* 613 F.2d 798 (10th Cir.) *cert. denied* 447 U.S. 906 (1980); *Huey v. Teledyne, Inc.,* 608 F.2d 1234 (9th Cir. 1979) *cert. denied* 458 U.S. 1106 (1982); *Hughley v. Eaton Corp.,* 572 F.2d 556 (6th Cir. 1978); *Marshall v. Sielaff,* 492 F.2d 917 (3d Cir. 1974).

The Court of Appeals found Petitioners' appeal to have been frivolous and to have subjected respondents to unjustified delay. Consequently, that Court assessed Petitioners double costs as sanctions and remanded the case to the District Court with instructions to "entertain appellees' motions for sanctions in the form of attorneys' fees . . . ." Petition Appendix B, ¶ 3. On July 17, 1985, the District Court entered Findings of Fact and Conclusions of Law awarding Respondents $14,084.43 as sanctions against Petitioners' lead counsel under 28 U.S.C. § 1927 for unreasonable and vexatious multiplication of the proceedings in pursuing their frivolous appeal beyond the point when it should have been apparent to counsel that the appeal was without merit. Opposition Appendix B.

Neither the proposition demonstrated by the District

Court Orders (that a District Judge has broad discretion to appropriately control discovery) nor that illustrated by the Court of Appeals Orders (that failure to prosecute is not an acceptable means of obtaining appellate review of interlocutory orders) is in the least controversial. Nothing here raises the sort of issue entrusted to this Court. Sup. Ct. R. 17. The central feature of this case, as further exemplified by Petitioners' repeated prayers for unwarranted mandamus relief (Petition, and Appendices C and J thereto), is Petitioners' refusal to follow the procedures which assure orderly adjudication leading to a final, appealable judgment.

The Petition itself is a hodgepodge of irrelevant citations, spurious accusations, and incomprehensible argument; it is the antithesis of "accuracy, brevity and clearness." Petitioners' treatment of the Federal Rules of Civil Procedure epitomizes their general approach to the applicable law. Petitioners repeatedly invoke the "short and plain statement of the claim" requirement of Rule 8, despite the fact that the District Court ruled on the insufficiency of Petitioners' evidence, not the adequacy of their Complaint. Petition at 4, 8, 13. Petitioners' assert that their Complaint was amended without their consent contrary to Rule 15(a), when nothing of the sort happened. Petition, at 6, 13. They allege that the Court of Appeals imposed a non-appeal sanction under Rule 41(b), when that Court gave Petitioners a full hearing and ruled on the issue before it. Petition, at 18.

The absence of findings of fact and conclusions of law from the District Court and the Court of Appeals is complained of when Rule 52(a) itself provides that such findings and conclusions were unnecessary for the dismissal in the

District Court[3], and despite inapplicability of the Federal Rules of Civil Procedure to the Court of Appeals. Petition, at 10. Petitioners alsc claim that the Court of Appeals should have granted them relief under Rule 60(b), though that is a form of relief only available in the District Court. Petition, at 9, 20. These examples demonstrate the total lack of foundation for this Petition.

CONCLUSION

Petitioners' case since filing their Complaint three and a half years ago has consisted of unsubstantiated claims of conspiracy, unsubstantiated allegations of antitrust violations, and unsubstantiated assertions of damages. The claims were finally terminated by the total absence of factual support, Petitioners' failure to follow the District Court's Orders and their failure to live up to their own commitment. Since dismissal, Petitioners have followed a circuitous and abusive track through the appellate process and now seek to continue their efforts before this Court. Petitioners should at last be stopped, and the Petition denied.

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[3]"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) [pertaining to directed verdicts after plaintiff's evidence in a case tried to the Court]."

Respectfully submitted,

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APPENDIX

APPENDIX A
GOODYEAR NON-WHOLLY OWNED SUBSIDIARIES

WFT, Inc.:
    Sixth Floor Associates
Litchfield Park Properties, Inc.:
    Westinghouse-Goodyear Properties
Brad Ragan, Inc.
Nitriflex, S. A. – Industrise Comercio
Deutsche Goodyear QMBH:
    Analaganyerwalcungagese/Schaft Deutsch
Goodyear Canada, Inc.
Goodyear Export, S.A.:
    Tubos Plasticos Spiraflex Ltd (Gdyr Brazil Owns 5%)
Goodyear India Limited
Goodyear Jamaica Limited
Goodyear Lastiklari Turk Amonia Sirkati
Goodyear Malaysia Barhad
Goodyear Maroc, S.A.:
    Good Import S.A.
Goodyear Taiwan Limited
Goodyear Thailand Limited
P.T. Goodyear Indonesia
The Goodyear Tire & Rubber Company of the Philippines
Mindinao Rubber Company, Inc.
Zabonga Rubber Company
Australia Synthetic Rubber Company Limited
Gran Industria de Neumaticos Centroamericana, S.A.
Toyobo Petcord Co., Limited
Nippon Giant

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, an Oklahoma corporation, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 82-C-1177-B
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, et al.,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is the defendants-appellees' motion for sanctions seeking an award of reasonable attorneys fees and expenses for appeal to be assessed against plaintiff-appellants' counsel. By direction of the Court of Appeals for the Tenth Circuit dated April 17, 1986, the Court has held a hearing regarding the defendants-appellees' said motions for sanctions. Also before the Court is defendants' motion to reconsider this Court's Order of August 29, 1984, denying sanctions in the form of attorneys' fees for work at the trial court level and the motion of plaintiffs' attorneys, Guy & Musseman, to withdraw as counsel. Following a hearing and consideration of the relevant evidence, applicable legal authority, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This Court dismissed with prejudice plaintiffs' claims against The Goodyear Tire & Rubber Company, The Lee Tire and

Rubber Company and The Kelly-Springfield Tire Company (hereinafter the "Corporate Defendants") and Clarence Burggraf, Sr., Shirley Burggraf, L. K. Newell and Goerge Utterback (hereinafter the "Individual Defendants") for failure to prosecute when plaintiffs' counsel refused to go forward with evidence on July 2, 1984, the date previously set for jury trial.

2. Plaintiffs subsequently appealed that dismissal, filing briefs and several letters in the appellate court seeking review of various interlocutory orders of this Court, including discovery and partial summary judgment orders.

3. Plaintiffs' briefs in support of their appeal never seriously adressed the propriety of the dismissal under Fed. R. Civ. P. 41(b).

4. On February 10, 1986, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal of plaintiffs' claims. In its Order and Judgment of that date, the Court of Appeals held that review of interlocutory orders in the context of an appeal from a Rule 41(b) Fed. R. Civ. P. dismissal is not permissible under either 28 U.S.C. §1291 or 28 U.S.C. §1651.

5. Defendants subsequently moved the Court of Appeals for sanctions in the form of double costs and reasonable attorneys' fees. On April 7, 1986, the Court of Appeals awarded defendants double costs pursuant to both Fed. R. App. P. 38 (for "frivolous" appeal) and 28 U.S.C. §1912 (for unjust "delay").

6. The Court of Appeals also remanded this case with the direction that this Court entertain defendants' Motions for Sanctions in the form of attorneys' fees pursuant to 28 U.S.C. §1927 and, upon evidentiary hearing, determine whether attorneys' fees should be imposed upon plaintiffs' counsel and, if so, the amount thereof.

7. Attorney Craig Tweedy of Sapulpa, Oklahoma, has been lead counsel for the plaintiffs in the case from the commencement of the litigation on December 14, 1982. The law firm of Musseman, Guy & Wilkerson through Donald J. Guy and William J.

Musseman entered their appearance in the case on June 19, 1984. Musseman, Guy & Wilkerson were engaged by lead counsel, Craig Tweedy, to assist in representing the plaintiffs in the litigation on June 6, 1984, less than one month before trial. Musseman, Guy & Wilkerson were actively in the case from June to October 1984, and thereafter served only in an advisory or consulting capacity, lead counsel being throughout attorney Craig Tweedy.

8. Counsel for the Corporate Defendants The Goodyear Tire & Rubber Company, The Lee Tire & Rubber Company and The Kelly-Springfield Tire Company presented evidence concerning the following attorneys expending the hours and hourly rates as set forth below and the same information concerning legal assistants:

Attorneys	**Hours Expended**	**Hourly Rate**	**Amount Billed**
Elizabeth Head	147.25	$175.00	$25,768.75
John E. Rooney	34.25	75.00	2,568.75
Mark Pennington	73.10	65-75.00	5,024.00
Brad P. Keller	18.50	65.00	1,202.50
Margaret A. Swimmer	39.00	60.00	2,340.00
Mary J. Rounds	27.20	75.00	2,040.00
Nancy G. Gourley	.50	70.00	35.00
Simon B. Buckner	.50	70.00	35.00
Legal Assistants			
Jane H. Terhune	60.25	45.00	2,711.25
Barbara E. Rush	1.25	45.00	56.25
Lucy O. Cook	1.00	35.00	35.00
	TOTAL		$41,816.50

The law firm of Moyers, Martin, Santee, Imel & Tetrick, as counsel for the individual defendants, Clarence Burggraf, Sr., Shirley Burggraf, L. K. Newell and George Utterback, offered

evidence supporting attorneys' fees regarding the appeal as follows:

Attorneys	Hours Expended	Hourly Rate	Amount Billed
Jack H. Santee	12.50	$135.00	$ 1,687.50
James R. Miller	29.30	100.00	2,930.00
John E. Rooney, Jr.	102.75	85.00	8,733.75
D. Stanley Tacker	2.00	85.00	170.00
			$13,521.25
Additional re sanctions hearings and briefing			$ 1,000.00
	TOTAL		$14,521.25

9. The defendants-appellees urge that the approximate total of 500 hours to respond to the various erroneous arguments raised by the plaintiff-appellants' counsel were necessary and reasonable. (One could advance the position that if it was so clear there was only one narrow issue for appeal, i.e., whether or not interlocutory orders are reviewable from a Fed.R.Civ.P. 41(b) involuntary dismissal, it should not be necessary to expend hundreds of hours addressing other irrelevant arguments.) The Court is not required herein to determine if defendants-appellees' total appeal attorneys' fees are reasonable, but only to determine for violation of 28 U.S.C. §1927, what is a reasonable amount of the total attorneys' fee of defendants-appellees that plaintiff-appellants' counsel should be required to pay?

10. Plaintiff-appellants' counsel, Craig Tweedy, not knowing better, induced an involuntary dismissal under Fed.R.Civ.P. 41(b) to occur in order to obtain review of interlocutory orders of this court. Attorney Tweedy proceeded with subjective good faith. Attorney Tweedy's conduct of the appeal is best characterized by the "empty head, pure heart" description of *Coleman v. McLaren,* 631 F. Supp. 749, 766 (N. D. Ill. 1985).

11. It is no simple task to determine at what point plaintiffs' appeal became unreasonable and vexatious. Hindsight compels

the conclusion that the appeal never was meritorious. However, yielding to plaintiffs' counsel the benefit of the doubt, some counsel are slower to hear and respond to the tolling of the death knell than others. All things considered, it is the Court's view that plaintiffs' lead counsel, attorney Tweedy, should be assessed 25% of the total attorneys' fees charged by the defendants-appellees (25% of corporate defendants' $41,816.50 equals $10,454.12, and 25% of the individual defendants' $14,521.25 equals $3,630.31), or a total fee of $14,084.43. The Court considers said sum reasonable and within the spirit and intent of 28 U.S.C. §1927.

12. No expenses will be assessed against plaintiff-appellants' lead counsel, Craig Tweedy. None of said attorneys' fees should be assessed against attorneys Musseman, Guy and Wilkerson (Don J. Guy and William J. Musseman) as they were not the moving force behind any unreasonable and vexatious conduct of this litigation. Further, said counsel, Musseman, Guy & Wilkerson, are permitted to withdraw as counsel herein.

CONCLUSIONS OF LAW

1. 28 U.S.C. §1927 provides that:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

2. Under §1927, a finding of subjective bad faith is not required. Instead, the standard is whether counsel's conduct was "frivolous, unreasonable or groundless, or that plaintiff continued to litigate after it became so." *Christianburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 421-2, 54 L.Ed.2d 648, 656-7 (1978); *Charczuk v. Commissioner of Internal Revenue,* 771 F.2d 471, 476 (10th Cir. 1985), and *In re TCI Limited,* 769 F.2d 441, 445 (7th Cir. 1985). A frivolous appeal is one which involves legal points not arguable on their merits. *Olympia Co., Inc. v. Celotex Corp.,* 771 F.2d 888, 893 (5th Cir. 1985).

3. Applying said standard to the record in this case, the Court finds that plaintiff-appellants' counsel, Craig Tweedy, unreasonably and vexatiously continued to pursue an appeal of irrelevant issues following clear precedent of the United States Supreme Court and the Tenth Circuit Court of Appeals being called to his attention that said issues were not reviewable under a Fed. R. Evid. 41(b) dismissal. Such conduct on the part of plaintiff-appellants' lead counsel warrants the sanctions herein stated pursuant to 28 U.S.C. §1927.

4. A Judgment contemporaneous herewith awarding attorneys fees to the defendants-appellees as provided in Finding of Fact 11 above as sanctions under 28 U.S.C. §1927 against lead counsel Craig Tweedy shall be entered. The Court determines said sum in Finding of Fact 11 to be reasonable and commensurate with the rationale of *Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983). No award for expenses will be granted to the defendants-appellees because the Court cannot determine from the record at what point in the appeal process said expenses were incurred or what percentage, if any, should be assessed against attorney Tweedy.

5. Attorneys Musseman, Guy & Wilkerson are hereby permitted to withdraw as counsel herein.

6. The motion of the defendants-appellees to reconsider the trial court's sanction denial order of August 29, 1984, is hereby overruled.

7. Any Find of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

DATED this (18th) day of July, 1986.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE